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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

MAXINE TONEY,

Defendant and Appellant.

C059847

(Super. Ct. No. SF101553A)

Defendant Maxine Toney appeals her conviction for first degree murder (Pen. Code, § 187) contending the trial court prejudicially erred in refusing to give a voluntary manslaughter instruction. We shall affirm the judgment.

**FACTUAL BACKGROUND**

Sometime in early 2006, Walter Wade White rented some rooms in his Stockton home to defendant and her three children. Defendant's boyfriend, Pavel Zapata, also sometimes stayed in the house with defendant. Defendant told Zapata she had previously owned the house.

In early May 2006, some family members gave White a ride from Oakland back to the Stockton house. White told his cousin he was unhappy with the people living in his house and he wanted them out. He repeated this complaint on May 24, 2006, while speaking with his cousin on the phone.

In the summer of 2006, White's nephew, Eldridge White, would occasionally stay at the house. He did not stay there often because he was not comfortable with defendant, her family, and her friends. Around July 2006, defendant's friends Latoya Daniels and Daniels's sister, Kayuta Holliman, moved into the house as well. Although Holliman and Daniels were defendant's age, they acted like her children.

About July 19, 2006, defendant was extremely upset because White and defendant's teenage son, James, had argued and White wanted James out of the house. Defendant was upset by White's "attitude" towards her children and her friends, Daniels and Holliman.

On July 21st or July 22nd, at about 4:30 a.m., defendant called Zapata. She was excited and upset. She told Zapata something big had happened and she needed his help. When Zapata arrived at the house three to four hours later, defendant, Holliman, and Daniels were in the home. They all appeared quite nervous and jumpy. He noticed the furniture, carpet, and drapes had been removed from the living room and a bedspread was covering the windows. The house smelled of household chemicals.

Defendant summoned Zapata into the bedroom. Defendant told Zapata that she, Daniels, and Holliman had murdered White. She told him that she had had Daniels and Holliman purchase a baseball bat and gloves on Saturday night. She then told Daniels to use a Taser gun on White to incapacitate him. Daniels did, but White was only stunned, not incapacitated. Defendant then instructed Holliman to hit White on the head with a baseball bat; Holliman did. White tried to escape, running toward the front door while pleading with defendant, promising her the house if she would stop the beating. Defendant grabbed White as he opened the door and pulled him back inside the house. As they struggled, White grabbed at the drapes and pulled them down.

At defendant's direction, Holliman began beating White with the bat again. Dissatisfied with Holliman's work, defendant took the bat from her and said, "Let me show you how it's done" and began beating White with the bat. Defendant told Daniels to get her a knife from the kitchen; Daniels did. Defendant stood over defendant, held him down with her foot, and cut his throat with the knife. White went still.

The women then began cleaning up the house. They rolled White in some bedding and moved him to the detached garage. They removed the drapes, carpet, and padding and put them in the garage. They then used whatever was in the house to try to clean up the blood. Defendant asked Zapata to help her dispose of White's body, and Zapata agreed. Then, defendant mentioned

the body could not be moved until after a previously scheduled pool party set for that afternoon.

Zapata told the women to use peroxide to clean the house. The pool party took place and Zapata left and went to work. After work, he bought supplies to move the body, including a blue tarp, latex gloves, and duct tape. He also brought a pick and shovel. He removed the back seats from his van and drove it and the supplies to White's house. Defendant, Daniels, and Holliman were at the house, but defendant told Zapata to delay his work until most of the neighbors were asleep.

After a couple of hours, Zapata and the women went to the garage and moved White, the carpet, carpet padding, window blinds, and about four garbage bags of debris into the van. In moving the body, a trail of blood was left on the garage floor. Zapata, Holliman and Daniels wrapped White's body in the tarp and duct-taped it closed.

The foursome embarked on their trip to dispose of the body with Zapata driving his van and defendant, Daniels, and Holliman following in defendant's car. Outside of Gilroy, they parked defendant's car and the three women got into Zapata's van. Near Watsonville on Highway 152, Zapata stopped at an embankment. He was looking for a place to dig a hole to bury White, but a car drove by several times which made Zapata panic. So, he and Holliman pushed White's body off the embankment. They got back in the van and returned to defendant's car, and again the women followed Zapata as he drove to Mount Hamilton State Park.

There, Zapata disposed of the carpet, padding, blinds, and trash bags along the side of the road. Defendant instructed Zapata to move the items so they would not be visible from the road. The women also put their outer clothing and shoes in a duffle bag. The group then returned to Stockton. A few days later, Zapata dumped the women's clothing in Atwater. Later, he also disposed of the dolly, used to move White's body, in Atwater.

The day after disposing of the body, Zapata returned to White's house to give further assistance in removing any evidence from the scene. He helped move furniture from the living room. Zapata changed the locks on the doors and tried to patch a hole in the wall which had been caused when White fell into the wall. Over the next few days, Zapata continued to help with clean up of the house. In that process, he found two bats and a bloody knife in the garage. One of the bats had blood on it. Defendant instructed Zapata that the bat and knife needed to be thrown away. Zapata cleaned the bat and knife with peroxide, put them in a bag, taped weights on the bag, and threw it off a bridge in Stockton.

Zapata used peroxide to clean a variety of areas where either defendant told him blood had splattered or he could see it, including the kitchen and the wall heater. Zapata took some additional items from the kitchen and dumped them in a wooded area. At defendant's behest, Zapata drove to Gilroy to check the newspapers for any reports of finding White's body.

In the meantime, Eldridge returned to the home. He noticed the walls had been painted a different color, and the dining room tiles had been removed. White was not there, but Eldridge assumed he was away on business.

About a week after the murder, on July 28, 2006, a body was found at the bottom of a ravine off Highway 152 near Watsonville. The body was wrapped in a blue tarp, clear plastic, and duct tape. The condition of the body and its state of decomposition made it clear the person had been killed approximately one week before.

On August 1, 2006, the body was identified as Walter White. There were 15 to 20 areas of impact to the victim's face and head. The blunt force trauma on White's face, head, and torso included multiple facial and skull fractures. There were also multiple stab wounds on his head, neck, torso, and extremities. Two of the stab wounds to his chest were potentially fatal. There was a defensive wound on his hand. White's last known address was identified as the house in Stockton, over 100 miles from where he was found.

On August 1, 2006, Santa Clara County Sheriff's Department Detective Ken Binder and Sergeant Dean Baker drove to White's Stockton address. No one answered their knock on the front door. About 30 minutes later, two women exited the house, defendant and Daniels. Defendant identified herself as "Angela Williams." Daniels identified herself as "Chaquita Williams." Defendant stated she lived in the house that White owned. She

stated White was not home and she had not seen him in a while, but offered he spent a lot of time on the computer at the library. She also offered that White's nephew, Eldridge, lived at the house and she had not seen him in a while either, and Eldridge played basketball in the park. The officers left to find Eldridge.

The next day, Detective Binder and Sergeant Baker spoke with defendant again at White's home. The officers informed defendant that White had been murdered. Defendant appeared shocked and surprised, but did not ask what had happened. Upon being questioned, defendant told the officers she had last seen White on about July 19, 2006. She said none of White's property remained in the home, but was in the detached garage. She gave them permission to search the garage. She allowed the officers to remove White's computer and property from the garage. On walking through the house, officers did not notice anything unusual.

On August 8, Detective Binder and Sergeant Baker returned to White's house with a couple of Stockton police detectives and confronted defendant with the false name she had previously provided. Daniels and Holliman were also at the house. Defendant then identified herself as "Mandalena Maxin." Daniels identified herself as "Shachenqua Williams." Later that day, defendant identified herself as "Maxine Antoinette Robinson." Daniels's true identity was discovered and she was arrested on an unrelated outstanding warrant.

Defendant then made a pretext call to Zapata in which she tried to elicit incriminating statements from him. Detective Binder advised her to tape-record it. She did and when she played it later for Binder, he did not hear anything of value on the tape.

On August 10, 2006, Detective Binder, Sergeant Baker, and various Stockton police officers searched White's house. There were blood spots on the kitchen floor. Fibers were found in the living room, which were similar to fibers found with White's body. A kitchen knife was found in front of the garage and a baseball bat in the garage.

On August 22, 2006, Holliman's boyfriend reported her missing to Stockton police. He was worried she had been murdered. Holliman was at her grandmother's house. Detective Binder and Sergeant Baker spoke with Holliman and she agreed to go with them to White's house. On August 25, 2006, Binder and other officers executed a search warrant at White's house. Holliman accompanied them, pointing out "areas of interest" and was arrested.

Searches of the house revealed stacks of linoleum tiles, bags of cleaning supplies, ceramic floor tiles, latex gloves, paint supplies and paint, eight empty peroxide bottles, and two empty Pine-Sol bottles. One of the paint cans had a sticker dated August 1, 2006, and the color of the paint and the other painting supplies was the same as that currently on the living

room walls. There were marks on the wall consistent with marks left by a knife, and a patched hole in the wall.

Upon removing the flooring, baseboards, and outlet covers, officers found multiple blood stains throughout the room, on the walls, the door threshold, on the wall heater, a mattress, and a quilt. Zapata's home was also searched and his van seized.

Zapata was located and arrested on August 25, 2006. Daniels was located and arrested in Vallejo on September 5, 2006. On September 27, 2006, defendant was arrested at an apartment in Vallejo. When asked about the various false names she had given, she indicated they were her married names.

In her initial interview with police, defendant said she and her children had moved into White's house in February or March 2006, after his ex-girlfriend had introduced them. Daniels moved in to the house later. Before July 17, 2006, defendant's teenage son moved out of the house because White demanded it. White did not want Daniels and Holliman in his house because he did not like the "lesbian lifestyle." Since they had nowhere else to go, defendant continued to let them stay in the house, sneaking them in after White went to sleep.

Defendant offered officers a number of versions of the events that took place the night of the murder. Defendant denied having been in the house when White was killed. She stated on Sunday she had been out and Zapata would not let her back into the house. She overheard Zapata telling Daniels and

Holliman how to clean up "stuff." She did not know why they were cleaning.

Defendant then claimed to have had a fight with White two days before the murder, after which Daniels and Holliman suggested they "do something" to White. Defendant thought Holliman was joking.

Defendant then claimed she, Daniels, and Holliman had been drinking and Daniels and Holliman took some ecstasy pills. Under the influence of ecstasy, Holliman stated she was going to fight White. Later, they purchased various items including a baseball bat and latex gloves. Daniels asked defendant if she could use defendant's Taser. Daniels took the Taser from defendant's room, defendant took some Tylenol PM, and then Holliman left the bedroom. Defendant fell asleep until she heard a big boom. She came out of her room and saw White lying on the floor with Daniels and Holliman standing over him. Daniels had a bat and Holliman a knife. Daniels hit White with the bat. Defendant screamed and returned to her bedroom. Holliman checked White's pulse and discovered he was dead. Daniels and Holliman moved the body to the garage and Daniels put everything in a bag. Then they called Zapata and asked for his assistance.

Defendant claimed that she had wanted White hurt, but did not want him killed. She also stated that Daniels and Holliman wanted to kill White and came up with the idea to kill him. She did not know they were going to do this.

### ***Defense case***

Defendant denied killing White. Her testimony was largely consistent with the final statement she gave to police: that she, Daniels, and Holliman had been out at a party where Holliman and Daniels used ecstasy. Holliman threatened to fight White, and Daniels wanted to use defendant's Taser. On their return, they shopped at Wal-Mart and bought various items including a baseball bat and gloves. Upon returning to the house, defendant took some Tylenol PM and went to bed. She awoke to her daughter crying, heard a boom, and went to the living room to see Daniels and Holliman standing over defendant with blood all over the ceiling, floor and walls. Daniels had a bat and Holliman the knife. Defendant called Zapata and he agreed to come over and help them dispose of the body and clean up the house.

### **PROCEDURAL HISTORY**

Defendant was charged with the murder of Walter White. It was also alleged that a deadly weapon, a knife, was used in the commission of the offense. (Pen. Code, § 12022, subd. (b).) Daniels and Holliman were also named as defendants. Zapata, pursuant to a plea agreement, was charged as an accessory after the fact. (*Id.*, § 32.) Defendant's trial was severed from her codefendants' trials.

At the jury instruction conference, defendant requested an instruction be given on voluntary manslaughter, CALCRIM No. 570. Counsel indicated he had tried "to state a hypothesis that . . . the violence erupted after, uh, uh, the victim, uh, discovered

the two, uh, uh, women there who were specifically told they weren't supposed to be staying there at night." The court indicated that counsel had earlier conceded there was no evidence of any such provocation. Counsel acknowledged there was no "direct evidence of any argument between, uh, uh, Mr. White and anybody else which precipitated the, uh, violence." Accordingly, the court found there was insufficient evidence of a sudden quarrel or heat of passion to warrant giving a voluntary manslaughter instruction to the jury.

Following the jury trial, defendant was found guilty of first degree murder with a not true finding on the knife-use enhancement allegation. Defendant was sentenced to 25 years to life.

### **DISCUSSION**

Defendant's sole contention on appeal is that the trial court prejudicially erred in refusing to instruct the jury on voluntary manslaughter. We disagree.

"In a criminal case, a trial court must instruct on general principles of law relevant to the issues raised by the evidence, even absent a request for such instruction from the parties. [Citation.] The obligation extends to instruction on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged. [Citation.]" [Citation.] Here, the trial court was required to instruct on the provocation/heat of

passion theory of manslaughter as a lesser included offense of the charged murder, if substantial evidence supported that theory." (*People v. Rogers* (2009) 46 Cal.4th 1136, 1168.)

"[W]e employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of voluntary manslaughter should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

"'Manslaughter, an unlawful killing without malice, is a lesser included offense of murder.' [Citations.] 'Although [Penal Code] section 192, subdivision (a), refers to "sudden quarrel or heat of passion," the factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation.' [Citations.] 'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.' [Citation.] '[T]he victim must taunt the defendant or otherwise initiate the provocation.' [Citations.] The "'heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . .'" [Citation.] "'[I]f sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.'" (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

Defendant contends the evidence supported a voluntary manslaughter instruction because the evidence showed White was

becoming "increasingly discontent with [defendant], her children and Daniels and, possibly, Holliman. . . . By the end of May 2006, White wanted [defendant] and her children out of the house. In July, White confronted [defendant] about her oldest son and ordered him out of the house. During the same month, White told [defendant] Daniels had to move and gave her the choice of termination of the tenancy or renting the entire house for double the rent. [¶] Thus, the totality of the facts and circumstances reflected an increasing hostility between White and [defendant] . . . . Viewed globally, it would not have been unreasonable for a jury to believe that the hostility exploded when White saw Daniels enter the house the night he agreed to babysit [defendant's] children. Despite the absence of direct evidence, the series of escalating criticisms and demands by White could have led a reasonable jury to believe White became so angry he, at least, verbally confronted Daniels and/or [defendant]--with whatever derogatory, authoritative or threatening language designed to eject Daniels from his home."

There is evidence of increasing tensions between White and defendant and Daniels. Yet, despite these increasing tensions, the relationship between White and defendant was good enough that he agreed to babysit her children the night he was killed. In fact, defendant testified they generally got along "fine, great, good." She claimed they had not had any "heated discussions" about the comments he had made about the "lesbian lifestyle." She also told others that, although they had argued

previously, things had calmed down and neither was "tripping" anymore.

There is no evidence, either direct or circumstantial, of a confrontation with White in which he used "derogatory, authoritative or threatening language." Trial counsel acknowledged there was no evidence of any provocation or of any argument which precipitated the killing. None of defendant's various versions of events that night suggests such a scenario. Defendant's versions of events included: a complete denial of being in the home on the night of the murder and denying all knowledge of any events that night; stating she had had a fight with White two days before the murder and Holliman threatened to do something to White, which defendant construed as a joke; or, that Holliman and Daniels killed White while she slept. Thus, none of defendant's versions of the murder provides evidence of any sort of confrontation between White and defendant, Daniels, or Holliman. Certainly there is no evidence of the type of confrontation between them that could have supported an instruction for voluntary manslaughter. There was no evidence that White "did anything to provoke a violent or impassioned response from defendant when the two met at defendant's [house], or that [White] acted in any manner to trigger such a passion as would naturally be aroused in the mind of an ordinarily reasonable person." (*People v. Rogers, supra*, 46 Cal.4th at p. 1169.) To have drawn such an inference from the evidence presented would have been pure speculation. "'Speculation is an

insufficient basis upon which to require the giving of an instruction on a lesser offense.'" (*Ibid.*)

"The trial court's duty to instruct on general principles of law and defenses not inconsistent with the defendant's theory of the case arises only when there is substantial evidence to support giving such an instruction." (*People v. Crew* (2003) 31 Cal.4th 822, 835.) Here, the trial court found there was not sufficient evidence of provocation to warrant a voluntary manslaughter instruction. We agree there was not substantial evidence of provocation sufficient to arouse the heat of passion in an ordinarily reasonable person. Consequently, the trial court was correct in refusing to instruct on voluntary manslaughter.

#### **DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_, BUTZ, J.

We concur:

\_\_\_\_\_, SCOTLAND, P. J.

\_\_\_\_\_, SIMS, J.